



BOARD OF INQUIRY (*Human Rights Code*)

Library

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaints by Harold Johnston and Carolyn Johnston dated October 26, 1994, alleging discrimination in services on the basis of handicap and association (relationship).

B E T W E E N :

Ontario Human Rights Commission

- and -

Harold Johnston
Carolyn Johnston

Complainants

- and -

Robert Levin
Midtown Hotel Limited c.o.b.
Gord's Shooters et al

Respondents

DECISION

Adjudicator : Randolph J. Mazza
Date : January 31, 1996
Board File No: BI-0064-95/BI-0065-95
Decision No : 96-006

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission)	
)	Kikee Malik, Counsel
)	

Harold Johnston)	
Carolyn Johnston)	Shawn Eagles, Counsel
)	

Robert Levin)	
Midtown Hotel Limited)	On his own behalf
)	

REASONS FOR DECISION

This hearing comes before the Board of Inquiry (the "Board") as a result of a complaint filed by Harold Clarence Johnston and Carolyn Johnston, his spouse, on or about the 26th day of October, 1994. The complaint was further amended and was served or refiled on or about May 31, 1995. The Complainant Harold Johnston alleges discrimination with respect to services because of a handicap contrary to section 1 and section 9 of the *Human Rights Code* (R.S.O. 1990, c.H.19, as amended). The Complainant Carolyn Johnston alleges discrimination with respect to services because of her relationship, namely the spouse of Harold Johnston, contrary to section 12 and section 9 of the *Human Rights Code*. The allegations arise out of an incident that took place at the restaurant establishment entitled Gord's Shooters which is owned and operated by Midtown Hotel Limited (the "Corporate Respondent") and managed by Robert Levin (the "Individual Respondent"). The hearing took place on December 11 and December 13 at the city of St. Catharines and all parties were present.

EVIDENCE

The Board has reviewed and assessed the evidence called by both the Complainants and the Respondents and has concluded that the sequence of events as described by each side are sufficiently similar to enable the Board to make the following finding of facts.

The Complainant Harold Johnston contracted polio as a child leaving him with a permanently unstable walk and which required him to wear a brace on his right leg over his clothing. At the age of approximately 22 months, while undergoing an operation, he was deprived of oxygen which resulted in permanent brain damage, leaving Mr. Johnston with a severe speech impediment. The Complainant Carolyn Johnston has been diagnosed as a schizophrenic with bouts of depression.

On or about September 26, 1994, the Complainants attended the Corporate Respondent's establishment to have a cup of coffee. The Individual Respondent first noticed the Complainants walking across the street towards his restaurant and observed that Mr. Johnston had an unsteady gait and that he was dressed in what the Individual Respondent described as "unusual attire," native dress including a headband with a feather.

The Individual Respondent met the Complainants shortly after they entered the restaurant and advised Mr. Johnston that he could not be served because, and there is some discrepancy as to what was actually said, he had had too much to drink. Mrs. Johnston explained that Mr. Johnston was not drunk, that he had a neurological disorder, and that they were there only to have a cup of coffee. The

Individual Respondent then asked Mr. Johnston for a medical card to prove his disability. Mr. Johnston responded that he did not have one nor was he obliged to carry one. The Individual Respondent testified that he refused to believe the explanation of Mrs. Johnston, and a shouting match then followed between the Complainants and the Individual Respondent. The Individual Respondent threatened to call the police if the Complainants did not leave, and the Complainants left shortly thereafter.

The entire incident took place in the view of restaurant patrons. In addition, Mrs. Johnston was surrounded by three of the Respondents' employees and was intimidated by their presence.

After leaving the restaurant, Mr. and Mrs. Johnston went home and began talking about the incident. Mr. Johnston became so upset that he left the home. Mrs. Johnston testified that she became so upset she thought she was having a nervous breakdown and contacted an ambulance to take her to the hospital. At the hospital she received medication to help her sleep. Mr. Johnston was later found by the police inflicting harm on himself by punching himself.

The Individual Respondent stated that there was no difference between the physical demeanour of Harold Johnston at the hearing and on the day of the incident. The Individual Respondent further testified that his decision about evicting Mr. Johnston from the premises, although he admitted telling Mrs. Johnston she was welcome to stay, was based on what he saw as his obligation as a tavern owner under the *Liquor Licence Act*. He also testified that the whole incident could have been avoided had Mr. Johnston been able to produce a medical card to attest to his disability.

ISSUES AND THE LAW

The Board sees that there are two major issues:

1. Did the Respondents infringe upon the rights of Harold and Carolyn Johnston through an act of discrimination?
2. If the answer to 1) is yes, what is the remedy?

Before this Board can consider whether or not discrimination took place, the Board must be satisfied that the Complainants fulfilled the *prima facie* requirements set out in ss. 1, 10, and 12 of the *Human Rights Code*.

Section 1 refers to equal treatment "with respect to services." By applying the facts of this case, the Board concludes that the Respondents were providing a service. Section 10, the interpretation section, defines handicap. Without quoting the definition of "handicap", the Board is satisfied that the disabilities of the Complainant Harold Johnston come within the description of "handicap" as set out in paragraphs 10(a) and (b). As for section 12, the section which forbids discrimination because of association, the Board concludes that although Mrs. Johnston's spousal connection was never made clear to the Respondents, her attendance with Mr. Johnston at the restaurant and her explanation with respect to the cause of his physical demeanour, clearly established an association with Mr. Johnston, which would bring her within the ambit of section 12.

Did the Respondents' Actions Amount to Discrimination?

The definition of discrimination which the Board must consider within the context of this case is, simply, the unequal treatment of a person or persons because of [a] handicap. The law is clear that the discrimination does not have to be intentional (see the *Ontario Human Rights Commission and Theresa O'Malley (Vincent Appellance) v. Simpsons - Sears Limited et. al.* (1986) vol. 7 C.H.R.R. (SCC) (p. D\3102, par. 24767)). Further, discrimination can exist when the perpetrator adopts a general practice or a universal rule which appears to discriminate on a prohibited ground. In this particular case, the policy whereby the Respondents cannot serve anyone who appears to be intoxicated, could discriminate against people with physical disabilities who demonstrate a physical demeanour which, from the tavern owner's perspective, may simulate an intoxicated person. However, although discrimination may appear on the face of a rule of general application, a Respondent may avoid being found in violation of the *Human Rights Code* if, in fact, he or she demonstrates a reasonable effort to apply the rule or policy in the circumstances for which it was designed. In other words in this particular case, therefore, the Respondents must demonstrate a reasonable effort to determine whether or not Harold Johnston was, in fact, intoxicated.

Liquor Licence Act

In his testimony, the Individual Respondent relied on sections 29, 31(4) and section 34(5) of the *Liquor Licence Act*. (R.S.O. 1990, c.L.19). Section 29 reads as follows:

"No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated."

In the case before the Board, it is clear that the Complainants were not buying liquor but had explained that they were in the restaurant for a cup of coffee. Therefore section 29 of the *Liquor Licence Act* is not applicable.

Section 34(5) of the *Act* permits the licensee to remove from the premises any person whom the licensee considers to be “undesirable.” The Board was not given any guidance as to when a person may be considered to be “undesirable”. However, although the Individual Respondent’s initial observation of the Mr. Johnston mentions his “unusual” attire, it is clear from the evidence that he asked Mr. Johnston to leave because he felt he was intoxicated. In view of the fact that the *Liquor Licence Act* sets out very specifically, in sections 29 and 31(4), the licensee’s right to refuse services to an individual who is either intoxicated or appears intoxicated, it is the Board’s conclusion that section 34(5) refers to a person being undesirable for reasons other than being intoxicated. Therefore, since there are no facts before this Board to establish what about Mr. or Mrs. Johnston appeared “undesirable”, section 34(5) does not apply.

This leaves the Board to determine whether or not section 31(4) is applicable to this factual situation. Section 31(4) states that:

- (4.) No person shall be in an intoxicated condition,
 - (a) in a place to which the general public is invited or permitted access;

In the opinion of the Board, this means that the person referred to in this subsection must in fact be intoxicated. This conclusion can only be arrived at in two ways: the person either admits that he or she is intoxicated, or it is clear from the person’s demeanour that he or she is in fact intoxicated. The phrase “appears intoxicated” is specifically not referred to in this section. In my view, it is therefore open to mean that the person who is alleged to be intoxicated to rebut that presumption by offering a reasonable explanation.

The Individual Respondent first observed Mr. Johnston’s physical demeanour from afar. He had decided to evict Mr. Johnston without taking into consideration the fact that he was wearing a brace around his left leg which could be easily seen; and he refused to accept the explanation of Mrs. Johnston that Mr. Johnston’s physical demeanour was as a result of a neurological disorder and polio. There is no evidence that the Individual Respondent detected alcohol on Mr. Johnston’s breath. His observations that Mr. Johnston had slurred speech, which had been explained in any event, was made only after he had asked Mr. Johnston to leave. Further, the Individual Respondent admitted in evidence that Mr. Johnston’s physical demeanour at the time of the incident

was no different than his physical demeanour during the hearing of this matter. There was no suggestion during the hearing that Mr. Johnston was intoxicated. Further, based on the Board's own observation of Mr. Johnston's physical demeanour during the hearing and his visible leg brace, the explanation offered by Mrs. Johnston was very plausible and, in the Board's opinion, was an explanation that a reasonable tavern owner should have accepted under the circumstances. The position taken by the Individual Respondent was untenable and it amounted to direct discrimination against Mr. Johnston. It is clear that Mr. Johnston received unfair treatment because of his handicap and that Mrs. Johnston, because of her association with Mr. Johnston, was also subjected to discrimination by the Individual Respondent. The fact that the Individual Respondent was prepared to permit Mrs. Johnston to stay while ejecting Mr. Johnston does not mitigate against this conclusion. Accordingly, since the Board is of the opinion that the Respondent Robert Levin did not make reasonable efforts to determine whether or not the Complainant Harold Johnston was in fact intoxicated, the Board finds that the Respondent Robert Levin discriminated against both Complainants contrary to sections 1, 9, 10 and 12 of the *Human Rights Code*.

CORPORATE LIABILITY

The Board, having made a finding against the Individual Respondent, must determine whether the Corporate Respondent is also in breach of the *Code*.

Under the *Human Rights Code*, section 45 addresses the question of corporate liability.

Section 45 reads:

For the purpose of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employer's organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

Section 45 exists for the purpose of protecting corporations who do not have control nor who can reasonably expect to have control over an employee whose actions may amount to violations of the *Human Rights Code*. This means that although the employee perpetrator may be found in contravention of the *Code*, there are instances in which the size or nature of the corporation may create such a 'distance' between the offending employee and the person or persons responsible for the direction of that corporation as to permit that corporation to avoid liability.

However, section 45 cannot be used as a shield by a corporation, where the offending employee is also part of the directing mind of the corporation (see *Wei Foo v. Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797 (Ont. Board of Inq.), *Shaw v. Levec Supply Ltd.* (1981) 14 C.H.R.R. D/36 (Ont. Board of Inq.), *Janzen et al., supra*, *Robichaud v. The Queen* (1987) 40 D.L.R. (4th) 577 (S.C.R.).)

In this case, the evidence shows that the Individual Respondent and the Corporate Respondent are one and the same. The Individual Respondent is clearly the sole directing mind of the corporation which is evident in his position as manager of the tavern/restaurant. As the sole directing mind of the Corporate Respondent, it is his responsibility to make certain that all patrons who require services are treated in compliance within the *Code*. His actions were the actions of the Corporate Respondent and therefore the Corporate Respondent is found jointly and severally liable with the Respondent Levin.

DAMAGES

Infringement and Mental Anguish

Section 41(1)(b) of the *Code* provides:

- (1) Where the Board of Inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the Board may, by order, ...
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

Section 41(1)(b) provides for two categories of compensation: the first category provides for compensation for the infringement itself; and the second category provides for compensation for mental anguish where the perpetrator has engaged in the infringement in a "wilful" or "reckless" manner.

(a) *The First Category*

In assessing the amount to be awarded under this category, it is the obligation of the Board to assess

an amount which realistically reflects the serious nature of the discrimination and upholds the principles which have been established by the *Human Rights Code*. (See *Morgoch v. Ottawa (City)* 2 (1989) 11 C.H.R.R. D/80 (Ont. Board of Inq.).)

There is no doubt that those who provide services, including tavern owners, must be sensitive to the circumstance of persons with physical or mental disabilities when making reasonable efforts to make sure that they are treated equally and that they have full access to the services provided. In this particular case, the Respondents had ample opportunity to avoid their acts of discrimination by making a close and more accurate observation of the Complainant's physical demeanour and by giving proper consideration to Mrs. Johnston's explanation of the reasons for Mr. Johnston's demeanour. The fact that the entire incident took place in the view of restaurant patrons, intensifies the humiliation and indignity suffered by the Complainants. Accordingly, considering all the circumstances including the isolated nature of the incident, the Board assesses the damages against the Corporate Respondent and the Respondent Robert Levin in the amount of \$1,500.00 for Harold Johnston and \$250.00 for Carolyn Johnston.

(b) *The Second Category*

The second category which allows compensation to a maximum amount of \$10,000.00, is invoked, where the Board is satisfied that the conduct of the Respondent was 'wilful' or 'reckless'.

Although the elements of the wilful act, s. 41(1)(b), are not evident, there is ample evidence to suggest that the Respondents were reckless in their behaviour toward the Complainants. There is no doubt that an eviction from any establishment is demeaning and humiliating. The fact that a person is evicted from an establishment because of their handicap, makes the humiliation more severe. Because the Respondents chose to ignore the clear signs of Mr. Johnston's disability and were reckless as to the consequences of that decision, the Respondents' actions amounted to mental anguish for Mr. Johnston who reacted by trying to inflict harm upon himself. Accordingly, the Board awards mental anguish in the amount of \$250.00.

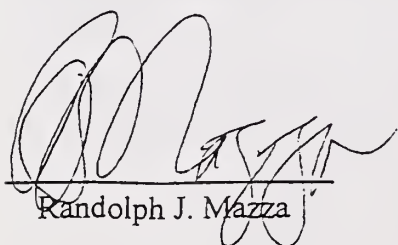
With respect to Mrs. Johnston, there was nothing about her general demeanour which would have given any indication to the Respondents as to how she might react after the Respondents decided to evict her husband. Her angry outburst at the time of the incident was understandable but not unusual. Accordingly, the Board is not satisfied that the grounds of mental anguish, as they pertain to Mrs. Johnston, have been established.

ORDER

Having found the Respondents, Midtown Hotel Limited c.o.b. Gord's Shooters et. al. and Robert Levin to be in breach of the *Human Rights Code*, and having found them to be jointly and severely liable for the losses arising from the infringements of the Complainants' rights, it is hereby ordered as follows:

- (1) the Respondents are to pay to the Complainant Harold Johnston the sum of \$1,500.00 for general damages;
- (2) the Respondents are to pay to the Complainant Harold Johnston the sum of \$250.00 for mental anguish;
- (3) the Respondents are to pay to the Complainant Carolyn Johnston the sum of \$250.00 for general damages;
- (4) pre-judgement on all awards of general damages will be in accordance with the *Courts of Justice Act*, R.S.O. 1990, C. 43 as amended, and will be payable from the date of service of the complaints. The applicable rate is 8% per annum, being the rate designated for the last quarter before the date of this order;
- (5) post-judgement interest on all awards of general damages will be in accordance with the *Courts of Justice Act* and will be payable from the date of this decision;
- (6) the Respondents are to provide the Human Rights Commission with a letter of assurance indicating their awareness of the provisions of the *Human Rights Code* and of their intent to abide by those provisions. This letter is to be forwarded to the Commission within 30 days of the date of receipt by the Respondents of a copy of this decision; and
- (7) Respondents are to post a copy of the *Human Rights Code* in Gord's Shooters in a place which can be viewed by the public. The *Human Rights Code* is to be posted within 30 days of the date of receipt by the Respondents of a copy of this decision.

Dated this 31st day of January, 1996



Handwritten signature of Randolph J. Mazza, consisting of a large, stylized 'M' followed by 'azza'.

Randolph J. Mazza